

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
) Case No. 2:12-cv-01282-JLR
Plaintiff,)
) **CITY OF SEATTLE'S MEMORANDUM**
v.) **IN RESPONSE TO COURT'S**
) **OCTOBER 23, 2018 ORDER**
CITY OF SEATTLE,)
)
Defendant.)
)
)

The City of Seattle submits this memorandum regarding the Tentative Collective Bargaining Agreement (TA) between the City and the Seattle Police Officers Guild (Guild or SPOG) in response to the Court's Order entered October 23, 2018. In its Order, the Court scheduled a status conference and directed briefing on four topics:

- (1) the process and timeline by which the TA will be finalized;
- (2) next steps in the event the TA is not finalized;
- (3) the parties' preliminary positions on whether the TA complies with the terms and purpose of the Consent Decree;
- (4) the point at which the Court should review any agreement between the City and SPOG to ensure compliance with the Consent Decree, and the process for such a review.

The City addresses each topic in turn.

I. Process and Timeline to Finalize the TA

After extensive negotiations, including consultations between Mayor Durkan's Office, the Office of Police Accountability (OPA), the Office of the Inspector General for Public Safety (OIG), and the Community Police Commission, the City has reached a TA with SPOG. The Seattle City Council's Labor Relations Policy Committee, responsible for establishing the City's bargaining parameters and any changes to those parameters that become necessary during the course of bargaining, has forwarded the TA to the full City Council. The TA supports significant reforms and pays fair wages to officers who have been working without a contract since 2014. Under Washington state labor law, the Council must either approve or reject the TA. It has no authority to change the version of the TA voted on by the union members.¹

The Council will vote on the TA during November; the present plan is that the vote will take place on November 13. If Council votes in favor of the TA, it is approved and will be presented to the Mayor for signing. Once the TA is signed by Mayor Durkan, it will become a final collective bargaining agreement (CBA).

II. Next Steps if the City Council Were to Reject the TA

The TA is a global agreement between the City and SPOG that resolves much more than any prior Seattle bargaining agreement. The City and SPOG successfully bargained the implementation of the Accountability Ordinance, the use of body-worn video (BWV) by police officers, and SPOG's withdrawal of all outstanding Unfair Labor Practice (ULP) claims. The TA also includes conversions of sworn officers to civilian investigators in OPA, improvements

¹ The City lacks the ability under state law to change any term of the TA without SPOG's agreement. *See Bremerton School District*, Decision 1589 (PERC 1983).

1 to the 180-day discipline timeline, and management improvements such as a new ability for the
2 Chief of Police to transfer officers for performance reasons.

3 In the event the City Council rejects the TA, the parties would have to return to the
4 bargaining table and would also need to address lengthy litigation of SPOG's pending ULPs
5 regarding implementation of the Accountability Ordinance and BWV. In addition, SPOG may
6 assert that Council's failure to ratify the TA constitutes another ULP.²

7 While it is theoretically possible these negotiations could include all issues, it is very
8 unlikely the Guild would agree to doing so. Under state labor law, unless both parties
9 specifically agree, issues that were not raised at or around the time bargaining began, and have
10 been mediated, cannot be certified for interest arbitration. RCW 41.56; WAC 391-55-200 2(a).
11 For these purposes, bargaining began in 2015, when neither the Seattle Police Department's
12 BWV policy nor the Accountability Ordinance existed, and so there is no presumption that those
13 issues would be combined with the contract negotiations.

14 When SPOG voluntarily agreed to address BWV and the Accountability Ordinance
15 during collective bargaining, it expressly stated that it was reserving its rights to assert those
16 issues be separately bargained prior to interest arbitration if no global agreement could be
17 reached. This means that the likely result of a failed TA is that negotiations would move forward
18 along three separate tracks: 1) continuation of negotiations for a new 2015-2018 agreement; 2)
19 BWV bargaining; and 3) Accountability Ordinance bargaining.

20 *2015-2018 Contract Bargaining*

21 _____
22 ² See *Mason County*, Decision 10802-A (PERC 2011) (County ordered to execute
23 agreement after commissioners voted to reject it); *Snohomish County Fire District I*, Decision
12669 (PERC 2017) (union ordered to sign collective bargaining agreement it had reached with
employer).

1 The Washington Public Employment Relations Commission (PERC) will likely certify for
2 interest arbitration those issues that remained unresolved in mediation before the parties started global
3 negotiations in 2017. Under Washington law, if the parties cannot reach agreement in mediation, an
4 impartial arbitrator is appointed who will resolve the open issues including wages and benefits for
5 SPOG members. At a minimum, it will take at least six to twelve months before a final decision is
6 rendered by an interest arbitrator. The arbitrator in this proceeding issues an award that determines
7 the contents of the new collective bargaining agreement.

8 *Body-Worn Video*

9 Since the City and Guild were in bargaining for several months on BWV before the global
10 negotiations began, the City could immediately request mediation of the issue. If the parties are unable
11 to agree, it would go to interest arbitration. If interest arbitration is required, this process is likely to
12 take at least nine to eighteen months. The arbitrator in this proceeding would determine the contents
13 of a separate agreement on BWV. Ongoing implementation of BWV throughout the Department
14 would be further complicated by the pending Unfair Labor Practice proceeding that seeks to overturn
15 the 2017 Executive Order mandating the use of BWV (if the TA is approved, then the Guild is
16 required to withdraw this ULP). In the meantime, if litigation were to proceed on the Guild's ULP,
17 the use of BWV might be suspended.

18 *Accountability Ordinance*

19 Because SPOG voluntarily bargained the Accountability Ordinance immediately following
20 its passage, which benefited all parties by avoiding further delays and litigation, the parties have not
21 had any formal negotiations on the Accountability Ordinance, apart from the voluntary global
22 discussions leading to the TA. This means that the City could insist only that the Guild begin
23 bargaining the Ordinance. After 60 days of bargaining, the City could request mediation. If the parties

are unable to reach agreement in mediation, an interest arbitrator would be appointed. This entire process may take at least eighteen to twenty-four months. As with BWV, if litigation were to proceed on the Guild's ULP, the City would be unable to implement any provision of the Accountability Ordinance that must be collectively bargained. The TA addresses all provisions of the Ordinance that must be bargained and otherwise provides for implementation of the Ordinance, such as the recognition by the Guild that OIG will have full and unfettered access to all aspects of the Department. Absent Council approval of the TA, the Accountability Ordinances provisions that must be bargained, like the OIG's access, would be called into question.

III. The TA Is Consistent With the Terms and Purposes of the Consent Decree

The TA complements the terms of the Consent Decree by furthering the City's and the Seattle Police Department's (SPD) goals of progress and accountability in policing. As described in more detail below, the TA improves accountability by strengthening the roles and abilities of OIG and OPA and providing improved discipline and performance management options.

On January 10, 2018, this Court found that the City, through the SPD, was in full and effective compliance with the requirements of the Consent Decree. (Dkt. 439.) Since that time, through its public reporting and audits, SPD has continued to demonstrate not only that it has sustained compliance but also its position as a leader of best practices in modern policing. (*See* Dkts. 442, 452, 458.)

SPD achieved compliance while under the current CBA, which has been in effect since 2013. It is notable that SPOG and the City began bargaining for a new labor agreement in early 2015. For more than three years, SPOG members have participated in significant reforms and trainings to achieve compliance without a new collective bargaining agreement, demonstrating the commitment of SPD's officers to sustained reform and innovation. The TA includes many gains

1 that formalize improvements since 2014 and advance accountability in policing. To highlight a
2 few of the gains, the TA does the following:

- 3 • Clarifies and, in some circumstances extends the 180-day clock for OPA to investigate
4 allegations of police misconduct, including bias complaints and serious use-of-force
5 investigations;
- 6 • Provides that two sworn investigators in OPA and a sworn sergeant in SPD human
7 resources can be replaced by civilians;
- 8 • Guarantees OIG full and unfettered access to all SPD operations;
- 9 • Implements BWV and the great majority of the Accountability Ordinance provisions (and
10 the Guild must withdraw its unfair labor practices complaints as to each);
- 11 • Eliminates the Disciplinary Review Board and replaces it with the option for officers to
12 use either arbitration or the Public Safety Civil Service Commission process. The TA
13 adopts a new process for selecting arbitrators for disciplinary appeals that will enhance the
14 ability of the City to get an independent arbitrator appointed in a timely manner; and
- 15 • Expands the Chief of Police's ability to transfer employees for performance-based reasons.

16 These provisions of the TA are major advances in the areas of discipline and accountability,
17 which are top priorities for the City and the Department.

18 Due to the inherent nature of collective bargaining, the City was unable to achieve all of
19 the changes it sought to make. Some topics were essentially tabled to avoid further litigation and
20 delays, with the City reserving the right to re-open the contract and bargain the issue as soon as
21 the TA is approved. In other instances, the parties compromised after significant discussion of
22 concerns and alternatives. Given the PERC's expansive interpretation of what must be bargained,
23 and the fact that failure to reach agreement requires the parties to go to interest arbitration, the

1 City concluded, in some cases, that a bargained for compromise was better than the uncertainty
2 of interest arbitration. The bargain reached between the City and the Guild is a TA that
3 significantly improves accountability within the Department.

4 One provision of the TA that represents a bargained for compromise addresses the
5 standard of proof applicable to police officers in a disciplinary appeal. The CBA currently in
6 effect, as well as the previous version, provide that when an officer's conduct involves
7 dishonesty, termination of employment is presumed to be the appropriate discipline and that the
8 City must prove its case by clear and convincing evidence. As the Court previously noted, *see*
9 Dkt. 357 at 8, that provision singled out dishonesty and treated it differently than all other forms
10 of misconduct. The TA removes that clause. In its place, the City and Guild agreed that the
11 burden of proof in a disciplinary appeal will be determined using the same evidentiary standards
12 that arbitrators apply to other types of misconduct.

13 The City seeks to correct any misunderstanding regarding the evidentiary standards used
14 in arbitration. First, under all twenty-eight of the collective bargaining contracts to which the
15 City is a party, employees have the ability to challenge discipline through arbitration. The
16 arbitrator in a disciplinary appeal must decide whether to apply the preponderance of the
17 evidence standard or an elevated standard, such as clear and convincing evidence. As is noted in
18 the TA, and as is true for all City employees who belong to a collective bargaining unit, one
19 factor that arbitrators consider is the severity of the discipline and the potential for the discipline
20 to have a stigmatizing impact on the employee; the greater the severity and stigma, the greater
21 the likelihood that an elevated standard of proof will apply.³ Consistent with the determination
22

23 ³ That is a standard feature of labor arbitrations. One treatise explains:

made by the Court, under the TA, police officers no longer will be singled out for special or different treatment in the appeal of discipline.

IV. Timing of the Court's Review

The City welcomes the Court's guidance on aspects of the TA at any time. However, if the Council were to vote to reject the TA currently before it, then there would be no agreement for the Court to review and the issues would be mooted for the time being.

CONCLUSION

The City respectfully submits the foregoing memorandum in response to the Court's Order and welcomes the opportunity to provide additional information and background on the TA when the Court directs further briefing.

Concerning the quantum of required proof, many, if not most arbitrators apply the "preponderance of the evidence" standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a "clear and convincing evidence" standard, with some arbitrators imposing the "beyond a reasonable doubt" standard.

Elkouri & Elkouri, *How Arbitration Works*, 15-26 to 15-25 (8th ed. 2016); *see also, e.g., Gen. Drivers, Helpers & Truck Terminal Employees Local No. 120 v. Sears, Roebuck & Co.*, 535 F.2d 1072, 1076 (8th Cir. 1976) (affirming arbitrator's use of clear and convincing standard where the CBA was silent as to evidentiary standard: "Because collective bargaining agreements are generally silent on procedural matters such as rules of evidence, an arbitration panel must be vested with the inherent authority to make procedural rulings. Otherwise, the national policy favoring arbitration of collective bargaining grievances would be frustrated.").

1 DATED this 29th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the following counsel of record:

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DATED this 29th day of October, 2018, at Seattle, King County, Washington.

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